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In The

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS

Clause 2 of Article VI of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the decision of the Seventh Circuit on the pendent claims issue is correct. The supremacy clause embodied in Article VI of the Constitution requires that a federal court's jurisdiction be governed by federal law. To rule otherwise and hold state law determinative on the Eleventh Amendment questions would shift to the states the power to fix that jurisdiction. Moreover, the availability of punitive damages is unrelated to the issue of jurisdiction. A state's substantive law of damages cannot dictate a federal court's jurisdiction. If, in fact, Illinois substantive law precludes the recovery of punitive damages, the federal court is bound to apply that rule.

Furthermore, pendent jurisdiction may be retained over the claims directed against the three guards, notwithstanding the resolution of the underlying federal claim in their favor. The doctrine of pendent jurisdiction confers power on the federal court to hear and resolve all claims in one case.

Finally, contrary to the petitioners' arguments, the Seventh Circuit's opinion does not strip a district court of its discretion to decline pendent jurisdiction. In this case, however, the federal and state claims were so interrelated that the Court of Appeals properly concluded that they should be adjudicated in one proceeding.

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REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH AMENDMENT DOES NOT BAR THE PENDENT CLAIMS, AS THEY ARE DIRECTED AGAINST INDIVIDUALS AND DO NOT SEEK TO IMPOSE A FINANCIAL LIABILITY ON THE STATE OF ILLINOIS.

A. Any Eleventh Amendment Limitations On A Federal Court's Pendent Jurisdiction Are Determined As Matters Of Federal Law; State Law Does Not Govern The Result.

The Seventh Circuit Court of Appeals concluded that there was no Eleventh Amendment bar because the pendent claims, like the civil rights claim, were brought against the correctional officials in their individual capacities. *Duckworth v. Franzen*, 780 F. 2d 645, 656 (7th Cir. 1985) (Petitioners' Appendix, A-16). The petitioners contend, however, that the Eleventh Amendment requires reference to state law to determine the "real party in interest." (Petition, 13-14). Based on Illinois statutes and case law, they argue that Illinois is the real party in interest, and these claims are therefore barred by the Eleventh Amendment. If this argument is accepted, the legislatures and courts of the various states would henceforth have broad power to determine a federal court's jurisdiction. The courts that have addressed this issue have uniformly rejected such arguments, and have held that the limits of federal jurisdiction are defined by federal law.

In *Thompkins v. Stuttgart School District No. 22*, 787 F. 2d 439 (8th Cir. 1986), the court of appeals reinstated a pendent state law claim that had been dismissed by the district court for lack of jurisdiction. The district court's de-

cision was based on an Arkansas statute that purportedly vested exclusive jurisdiction of such a claim in the state courts. The court of appeals held that the state legislature could not limit a federal court's jurisdiction in such a fashion:

> "The right to assert jurisdiction over state claims through the doctrine of pendent jurisdiction is a law of the United States, and, as such, under the supremacy clause of the Constitution, Article VI, this law has precedence over any contrary state law. Once a district court has determined that under the laws of the United States it may assert pendent jurisdiction, any contrary state law which would deny that jurisdiction is ineffective."

787 F.2d at 441 (footnote and citations omitted).

In *Wilson v. Beebe*, 770 F. 2d 578 (6th Cir. 1985), the Sixth Circuit, *en banc*, upheld the exercise of pendent jurisdiction over a common law negligence claim against a state police officer. The officer argued that the Michigan indemnity statute clothed him with Eleventh Amendment immunity. While the twelve members of the *en banc* court disagreed on various aspects of the majority opinion, they were unanimous in concluding that a state legislature could not "bootstrap" immunity by the passage of a statute:

> "[T]he liability which Wilson sought to impose was not one which must be paid from the State treasury. It will be paid by the State because the State has exercised its option under M.C.L.A. § 691.1408(1) and elected to indemnify Beebe. This obligation is not imposed on the State; it is an obligation voluntarily imposed. There would be no question of who would be liable for a judgment in this case except for the State's voluntary decision to indemnify Beebe; only Beebe would be liable. The State cannot create an Eleventh Amendment bar by its voluntary act when the plain-

> tiff has proceeded only against the individual wrongdoer in his individual capacity."
>
> 770 F. 2d at 588 (emphasis in original).

The Ninth and Fifth Circuits have reached similar results, as have various district courts that have passed on the question. *Demery v. Kupperman,* 735 F. 2d 1139, 1146-1149 (9th Cir. 1984), *cert. denied,* — U.S. —, 105 S. Ct. 810 (1985); *Downing v. Williams,* 624 F. 2d 612, 626 (5th Cir. 1980), *vacated on other grounds per curiam,* 645 F. 2d 1226 (5th Cir. 1981); *Barger v. State of Kansas,* 620 F. Supp. 1432, 1437-1438 (D. Kan. 1985); *Goka v. Bobbitt,* 625 F. Supp. 319, 323-324 (N.D. Ill. 1985).

The authorities cited by the petitioners do not compel a different result in this case. The suit in *Palmer v. State of Ohio,* 248 U.S. 32 (1918), was against the sovereign in both name and substance, and was properly barred under the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945), the Court held that Indiana's consent to jurisdiction in tax refund suits in state court did not waive its immunity in federal court. 323 U.S. at 464-466. Significantly, the Court also stated a distinction of importance to this case:

> "Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."
>
> 323 U.S. at 462 (citations omitted).

The petitioners further insist that these claims cannot be litigated in federal court because "the identical lawsuit against the same officials would not be permitted in Illinois courts of general jurisdiction." (Petition, 14). Under

this reasoning, any state can limit its employees' exposure to federal litigation by relegating certain claims to special courts, tribunals or commissions. The Seventh Circuit has previously rejected such a suggestion [*Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F. 2d 323, 330, n. 9 (7th Cir. 1977)], and this Court should do the same.

B. As A Matter Of Federal Law, There Is No Eleventh Amendment Bar To These Claims As They Do Not Seek To Impose A Financial Liability On The State Of Illinois.

At least as far back as *Ex parte Young*, 209 U.S. 123 (1908), this Court has adhered to the principle that a state official is subject to suit in his individual capacity in federal court. More recently, Justice Rehnquist reviewed the Eleventh Amendment case law at length and articulated the test as follows:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which *must* be paid from public funds in the state treasury is barred by the Eleventh Amendment."

Edelman v. Jordan, 415 U.S. 651, 663 (1974) (emphasis added).

In the lower courts, the petitioners relied on an Illinois statute that extends indemnity to state employees [Ill. Rev. Stat. 1985, Ch. 127, Sec. 1302(a)] as support for their claim that the state treasury would have to pay any judgment on the pendent claims. They have abandoned that argument in this Court (Petition, 15), but they do not explain how or why any judgment on the pendent claims would now be a charge against the State of Illinois. Even if the respondents prevail and recover judgments, it is clear that those judgments cannot compel payment from the

state treasury. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982).

C. The Decision Of The Court Of Appeals Will Not Foster Forum Shopping, Since The Federal Court Must Apply The Substantive Law Of The State, Including Any Restrictions On Punitive Damages.

The petitioners and the *amici* argue at length that the decision of the Court of Appeals will foster "forum shopping" because plaintiffs will seek to avoid state-imposed limitations on punitive damages. (Petition, 14-17; Brief of *Amici Curiae*, 3-6). Neither the petitioners nor the *amici*, however, explain why a federal court would be free to ignore the doctrine established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which requires a federal court to apply the state rules of decision to state law claims.

In determining whether punitive damages are available on state law claims, a federal court must apply the applicable state law of damages. *See, e.g., Cathey v. Johns-Manville Sales Corp.*, 776 F. 2d 1565, 1569 (6th Cir. 1985); *Jackson v. Johns-Manville Sales Corp.*, 781 F. 2d 394, 396-398 (5th Cir. 1986). If Illinois law in fact limits or bars punitive damages on causes of action such as those set forth in the pendent claims, then a federal district court applying Illinois law must abide by those limitations. Such limitations, however, cannot serve to deprive a federal court of its jurisdiction to hear the claim.

II.

THE JURY VERDICTS ON THE CIVIL RIGHTS CLAIMS IN FAVOR OF THE THREE GUARDS DID NOT DEPRIVE THE FEDERAL COURT OF ITS PENDENT CLAIM JURISDICTION.

The petitioners' concept of pendent jurisdiction would require automatic dismissal of state law claims whenever

the underlying federal cause of action is resolved favorably to the defendant. (Petition, 18-20). This Court has never adopted such a narrow view. In *Rosado v. Wyman,* 397 U.S. 397 (1970), the district court's retention of jurisdiction over the state law claims was upheld, notwithstanding the intervening mootness of the federal issue:

> "We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim."
>
> 397 U.S. at 405 (footnote omitted).

The petitioners' principal authority, *Bender v. Williamsport Area School District,* 475 U.S. —, 106 S. Ct. 1326 (1986), dealt with the very different issue of whether one member of a school board had standing to appeal from a declaratory judgment entered against the board. 106 S. Ct. at 1328. That decision had nothing to do with the subject of pendent jurisdiction, and it certainly did not overrule *Rosado,* either expressly or by implication.

In addition to the *Rosado* factors of "conservation of judicial energy and the avoidance of multiplicity of litigation," the Seventh Circuit opinion expresses one other compelling rationale for the retention of pendent claim jurisdiction—the impact of the applicable Illinois statute of limitations. 780 F. 2d at 657 (Petitioners' Appendix, A-17—A-18). Contrary to the petitioners' suggestion, retention of pendent claim jurisdiction in this context is neither extraordinary nor a departure from precedent. The same result has been reached by the Fifth, Eighth, and Eleventh Circuits. *Rheaume v. Texas Department of Public Safety,*

666 F. 2d 925, 931-932 (5th Cir. 1982), *cert. denied,* 458 U.S. 1106 (1982); *Hess v. St. Joseph Police Pension Fund,* 788 F. 2d 1344, 1346-1347 (8th Cir. 1986); *Emory v. Peeler,* 756 F. 2d 1547, 1555 (11th Cir. 1985).

Petitioners Hartgrove, Krug, and Tipton cannot rely on the jury verdicts to destroy the federal court's jurisdiction of the pendent claims. Under the rule of *Rosado,* those claims survive, and should be adjudicated in accordance with the decision of the Seventh Circuit.

III.

THE SEVENTH CIRCUIT DECISION DOES NOT STRIP THE DISTRICT COURT OF ITS DISCRETION TO DECLINE PENDENT JURISDICTION IN APPROPRIATE CASES.

The petitioners and the *amici* accuse the Seventh Circuit of having established an "absolute" or "immutable" rule mandating the exercise of pendent jurisdiction, and depriving the district court of its discretion to decline such claims. (Petition, 21; Brief of *Amici Curiae,* 7). Neither adjective is accurate. In *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), this Court said that there might be "situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." 383 U.S. at 727. In this case, the Seventh Circuit found an "almost complete factual overlap between the main and pendent claims." 780 F. 2d at 656 (Petitioners' Appendix, A-16). In this context, discretion should be exercised in favor of retention.

If anything, the Seventh Circuit has laid down a rule that requires a district court to exercise its discretion in ac-

cordance with the principles announced in *Gibbs*. For instance, in *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F. 2d 1341 (7th Cir. 1986), the Court of Appeals wrote:

> "The exercise of pendent jurisdiction is discretionary, and the discretion runs both ways: discretion (almost unreviewable) to relinquish the jurisdiction, but also discretion to assert it (provided of course that the pendent claim really is the pendant of some colorable federal claim) in appropriate cases even when the federal claims have fallen out before trial.
>
> . . . . .
>
> Judicial economy, the essential policy behind the modern doctrine of pendent jurisdiction which *Gibbs* created, supports the retention of pendent jurisdiction in any case where substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort."
>
> 790 F. 2d at 1347-1348.

The petitioners and *amici* both rely on *Moor v. County of Alameda*, 411 U.S. 693 (1973), for the proposition that a district court has virtually unfettered discretion to decline the exercise of pendent jurisdiction. Their argument ignores the subsequent decision of this Court in *Hagans v. Lavine*, 415 U.S. 528 (1974), in which Justice White wrote for the Court:

> "[I]t is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims."
>
> 415 U.S. at 545-546.

As noted by the Court of Appeals, there is an "almost complete factual overlap" between the civil rights and pendent claims. Viewed together, these claims constitute one "case" under *Gibbs*, and it is proper that they be adjudicated in the same court.

CONCLUSION

In its ruling on the pendent claims issue, the Seventh Circuit is correct. There is no Eleventh Amendment bar to the exercise of pendent jurisdiction in this case, and that jurisdiction survives and these claims should be adjudicated in accordance with the opinion.

Upon close scrutiny, the arguments of the petitioners and the *amici* fail. To accept their arguments would encourage the legislatures of the fifty states to develop fifty different rules of jurisdiction. Such a result would be abhorrent to the Constitution. For the reasons set forth, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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